

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DARYL PRENDERGAST and
KATHERINE PRENDERGAST,

Plaintiffs,

v.

CAPITAL ONE, N.A., a Virginia
corporation, INTEGRATED LENDER
SERVICES, INC., a Delaware
corporation, KATHLEEN MOONEY
and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 15cv2777 DMS (JMA)

**ORDER (1) GRANTING
PLAINTIFFS' MOTION FOR
RECONSIDERATION AND (2)
GRANTING PLAINTIFFS'
MOTION TO REMAND**

On December 10, 2015, Defendant Capital One, N.A. removed this case to this Court alleging jurisdiction under both the diversity and federal question statutes. To establish diversity, Capital One alleged Defendants Integrated Lender Services and Kathleen Mooney were fraudulently joined as sham defendants, and thus their citizenship should be disregarded. As part of these allegations, Capital One stated, “a non-diverse defendant is said to be fraudulently joined where ‘the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.’” (Notice of Removal ¶ 6.c.) (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)). Capital One then turned to the claim alleged against Defendants Integrated and Mooney (breach of trustee duties), and explained why that claim failed as a matter of law. (*Id.* ¶¶ 6.c-d.) Capital One alleged

1 there was federal question jurisdiction because the primary issue to be adjudicated was
2 “whether ING issued an erroneous IRS Form 1099-C.” (*Id.* ¶ 8.)

3 In response to the removal, Plaintiffs filed a motion to remand. In that motion,
4 they raised three arguments. First, they asserted Defendants failed to comply with 28
5 U.S.C. § 1446(a), which rendered the removal procedurally defective. Second, they
6 contended there was incomplete diversity between the parties. Third, Plaintiffs argued
7 there was no federal question jurisdiction. Nowhere in the motion to remand did
8 Plaintiffs challenge or question the standard for fraudulent joinder set out by Capital
9 One in the Notice of Removal.

10 In ruling on the motion to remand, the Court agreed with Plaintiffs on the third
11 argument that federal question jurisdiction was lacking. However, the Court disagreed
12 with Plaintiffs on diversity jurisdiction. There being no dispute between the parties
13 about the standard for fraudulent joinder, the Court adopted Defendants’ approach,
14 agreed with Defendants that Integrated and Mooney were sham defendants, and thus
15 declined to consider their citizenship in deciding the diversity issue. Because there was
16 complete diversity between the remaining parties, Plaintiffs and Capital One, the Court
17 found there was diversity jurisdiction. The Court declined to address Plaintiffs’ first
18 argument about the alleged procedural defect in the notice of removal in light of its
19 finding that Defendants Integrated and Mooney were fraudulently joined.

20 On March 7, 2016, Plaintiffs filed the present motion for reconsideration of the
21 Court’s order denying their motion to remand. Defendants filed an opposition to the
22 motion, and Plaintiffs filed a reply. For the reasons set out below, the Court grants
23 Plaintiffs’ motion for reconsideration, and grants Plaintiffs’ motion to remand.

24 Although Plaintiffs did not raise this particular argument in their motion for
25 reconsideration or any of their previous briefs on this issue, the Court finds the standard
26 for fraudulent joinder set out in the Notice of Removal and Defendants’ previous briefs
27 on this issue is incorrect. In deciding the motion to remand, the Court looked only to
28 the claim alleged against Defendants Integrated and Mooney, and considered that claim

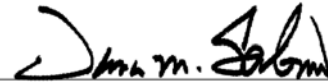
1 according to the standard set out by Defendants, which is akin to the standard for
 2 motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Although one
 3 other district court in the Ninth Circuit has applied this standard, *see Johnson v.*
 4 *GranCare, LLC*, No. 15-cv-03585-RS, 2015 U.S. Dist. LEXIS 151971 (N.D. Cal. Nov.
 5 9, 2015), “[t]he vast majority of district court decisions ... have determined that the
 6 fraudulent joinder standard is tougher to meet than the Rule 12(b)(6) standard, such that
 7 fraudulent joinder will not be found if there is ‘any possibility’ that the plaintiff could
 8 state a claim.” *GranCare, LLC v. Thrower*, Nos. C 15-05362 WHA, 15-05575 WHA,
 9 2016 U.S. Dist. LEXIS 36413, at *14 (N.D. Cal. Mar. 21, 2016) (quoting *Hunter v.*
 10 *Philip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)). This approach is consistent
 11 with the “strong presumption” against removal jurisdiction, *Hunter*, 582 F.3d at 1042,
 12 and the “general presumption” against fraudulent joinder. *Hamilton Materials Inc. v.*
 13 *Dow Chemical Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

14 When considered through this lens, it is clear Defendants have not met their
 15 burden to show, by clear and convincing evidence, *id.*, that Defendants Integrated and
 16 Mooney are sham defendants. Their arguments in opposition to Plaintiffs’ motion to
 17 remand go to the merits of Plaintiffs’ claim, which is insufficient to establish fraudulent
 18 joinder. *Mahoney v. Unum Group*, No. C 15-3532 SBA, 2015 U.S. Dist. LEXIS
 19 145804, at *2-3 (N.D. Cal. Oct. 27, 2015). “Rather, a finding of fraudulent joinder
 20 requires a showing that the plaintiff could not plead any facts sufficient to state a claim
 21 against those defendants, such that leave to amend would be futile.” *Ramirez v. Speltz*,
 22 No. C 15-03538 WHA, 2015 U.S. Dist. LEXIS 137902, at *7 (N.D. Cal. Oct. 8, 2015).
 23 Here, Defendants made a preliminary showing that they owed no *fiduciary* duty to
 24 Plaintiffs to apply the proceeds of the sale in a certain order. *See Hatch v. Collins*, 225
 25 Cal. App. 3d 1104, 1112-13 (1990) (finding claim against trustee could not “be called
 26 a breach of any fiduciary relation.”) However, Defendants did not show there is no
 27 possibility Plaintiff could state a *negligence* claim against them based on the facts
 28 alleged in this case. *Id.* Accordingly, there is no fraudulent joinder here.

1 Absent a finding that Defendants Integrated and Mooney are sham defendants,
2 the Court must consider their citizenship in determining whether there is complete
3 diversity. There is not. Defendants Integrated and Mooney are citizens of California,
4 as are Plaintiffs. Thus, complete diversity is lacking. In light of this finding, and the
5 Court's previous finding that there is no federal question jurisdiction, which finding
6 Defendants do not dispute, the Court grants Plaintiffs' motion to remand. The Clerk
7 of Court shall provide a certified copy of this order to the clerk of the State court, and
8 thereafter close this case.

9 **IT IS SO ORDERED.**

10 DATED: April 27, 2016



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12 HON. DANA M. SABRAW
13 United States District Judge
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